

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING
EN BANC**

SEARCHED
INDEXED
FILED
APR 10 1975
U.S. COURT OF APPEALS
SECOND CIRCUIT

74-2100

B
RJS

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee.

- against -

RICHARD PERRY,

Appellant.

**PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC**

JACOB P. LEFKOWITZ
Attorney for Appellant
150 Broadway
New York, New York 10038
(212) 964-4845

JULIA P. HEIT
Of Counsel

(7728)

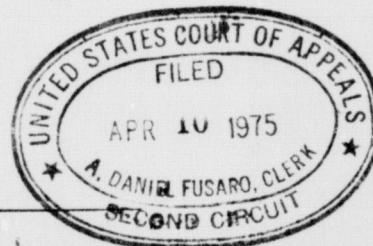
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J.
(201) 257-6850

New York, N. Y.
(212) 565-6377

Philadelphia, Pa.
(215) 563-5587

Washington, D. C.
(202) 783-7288



3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Appellee, :
-against- : Docket No. 74-2100
RICHARD PERRY, :
Appellant. :
-----X

PETITION FOR REHEARING
WITH SUGGESTION
FOR REHEARING EN BANC

On March 28, this Court (The Honorable Edward Lumbard, C.J.; the Honorable F. Friendly and the Honorable M. Feinberg) affirmed appellant's conviction of influencing the outcome of harness races by bribery and of conspiring to do so in violation of 18 U.S.C. Section 224.

This decision not only reflects the unique issues which were involved in the appeal but also stretches the standards of a defendant's Due Process right to a fair trial to its breaking point. Accordingly, the impact of this decision on a defendant's right to a fair trial require that the application for rehearing with suggestion for rehearing en banc be granted.

Before proceeding with appellant's arguments in behalf of this application, it is requested that all of the errors complained of in Appellant Perry's brief should be considered only

in the context of the facts as applied to him and not in conjunction with the evidence which was admissible against Defendant Gerry. As will be demonstrated, the panel decision reflects a clear-cut tendency to lump together the cases of Defendant Gerry and Appellant Perry.

I.

Both Appellant Perry and Defendant Gerry had urged that the Court's refusal to order Kraft recalled as part of the Government's case so that he could be subjected to further examination based on the tapes was erroneous. In sustaining the Government's position, this panel held:

While it might have been wiser to permit Kraft to be recalled, we find no abuse of discretion in this matter. The defense attorneys obtained possession of the Pullman tapes while Kraft was still testifying as a government witness. Their decision not immediately to divulge the existence of the tapes and then use them in examining Kraft was a tactical decision. slip op. p. 2605

The panel's conclusion does not reflect the true state of facts. Only Defendant Gerry and his attorneys were privy to Pullman's taping of the Governmental conferences. No other counsel, including Perry's counsel, were even aware of the existence of the tapes until Mr. Bobick (Gerry's attorney) brought them to the attention of the Court the day after Kraft had completed his testimony. Therefore, contrary to the panel decision, the failure to use the tapes upon the cross-examination of Kraft cannot possibly be viewed as a "tactical decision" on the part of Appellant's counsel. Since Appellant Perry had no knowledge of these taped conversations until they were actually produced in Court, he should

have been given the opportunity of re-examining Kraft on cross-examination. Such an examination, at the very least, might have had the effect of mitigating Kraft's damaging testimony pertaining to the "fierce mob." It is no answer to this argument to suggest, as did this Panel, that Perry could have called Kraft as a defense witness. If Perry had in fact called Kraft as his own witness, he would have been restricted to the rules governing the examination of one's own witnesses and thus, he would not have had the leeway in his examination that he would have had if permitted to cross-examine Kraft as a Government witness.

II.

Appellant Perry also urged before this Court that the deliberate elicitation by the Government of evidence that he was associated with the mob destroyed any possibility of his receiving a fair trial.

Again, in its decision, this Panel lumped the effects of the mob evidence against both Appellant Perry and Defendant Gerry. The Court ignored the fact that of all the 23 defendants in this case, it was only Perry who was singled out and ominously labeled a mobster. In every single instance complained of, it was Perry and not Gerry who was denominated a member of the "fierce mob," a son-of-a-mad man, and a bookmaker. As the prejudice inherent in the former two terms is readily discernible, this Panel in reference to the term bookmaker stated:

It is difficult to see how the use of the term "bookmaker" which does not have an inherent organized crime connotation could have been unduly prejudicial or shocking in a trial involving allegations of fixing horse races. slip op. at p. 2595

While perhaps this Panel would have been correct in reaching this conclusion if the "bookmaker" testimony was viewed separately from the other evidence in the case, unfortunately, this was impossible. The Panel decision overlooked the fact that the Government not only used evidence depicting Appellant Perry as a bookmaker but the Government thereafter presented two admitted bookmakers as witnesses (Zito and Haberstraw) who admitted to committing almost every conceivable type of crime. The jury simply had to associate Appellant Perry, the bookmaker, with the activities of these two hardened criminals who also professed to be bookmakers and had to be convinced that Perry was also a dangerous mob member.

The Court also appeared to justify the admission of all this damaging mob evidence on various grounds such as bearing on Kraft's state of mind and that the exclusion of the reference to the term "bookmaker" by the trial court would have impermissibly limited the Government's right to refresh the recollection of an obviously recalcitrant and recanting witness. Notwithstanding Perry's contention that such references were entirely unnecessary to the Government's case, it is nevertheless blatantly unfair that of the 23 defendants in this case, only Appellant Perry had to bear the prejudicial brunt of these evidentiary concessions. Such prejudice was further exacerbated when the tapes unequivocally established that Perry was not associated with any mob and was a straight gambler and not a bookmaker. Despite the fact that the Government was well aware of this, they were still permitted to capitalize on this slanderous testimony to insure their convicting Perry of the crimes charged.

Finally, in this regard, this Panel stated:

We find that when these isolated references are viewed in the context of the testimony during which they were elicited and when weighed in the perspective of an eleven week trial which produced over ten thousand pages of transcript, the appellants were neither unduly prejudiced nor denied a fair trial.

This conclusion overlooks the hard fact that after their verdict, some of the jurors informed Perry's counsel that Perry was convicted only because they thought that he was an enforcer for the mob. This factor is indeed part of the record in this case as counsel in a motion to set aside the verdict specifically set forth the details in a motion which motion was denied without a hearing by the trial Court. Hence, regardless of whether the mob references are to be viewed only as isolated references, these references did have a devastating and negative impact upon the jury when deliberating upon the question of appellant's culpability. It must also be pointed out that it would be extremely difficult for any juror to forget the term "fierce mob" as applied to Perry whether the trial lasted only a few days or lasted many months. The stigma of such an accusation would remain implanted in the juror's minds despite even the most stringent instructions from the Court.

III.

In answer to Perry's contention that the lawless conduct of the Government in this case was so shocking to the administration of justice that an acquittal should have been ordered as a matter of Due Process, this Panel insinuated that Pullman entrapped the Government into making its outrageous statements. See slip op. at p. 2603. While this Court characterized the many statements

of the prosecutor and government agents as "both deplorable and unprofessional," this Panel clearly implied that such statements were made only because of Pullman's enticement. It is difficult to understand how such conduct on the part of the Government can be so easily excused. Certainly, the conduct of the Government attorneys should be held to a far more exacting standard than that of their own witness.

However, it was precisely because of the Government's propensity to submit so easily to such misconduct that Judge Judd's integrity was placed in issue at trial. It is difficult to reconcile this Court's decision that it did not constitute reversible error for the trial Court's integrity to be placed into issue with the myriad of cases in this Circuit which hold it reversible error for the Government to place its own credibility or integrity in issue before the jury. United States v. Puco, 436 F.2d 761 (2d Cir., 1971); United States v. Grunberger, 431 F.2d 1062 (2d Cir., 1969); United States v. White, 324 F.2d 814 (2d Cir., 1963). It is far worse for the Court's integrity to be so contested as the Court must remain both independent and neutral throughout the entire proceedings. Judge Judd felt compelled after the Prosecutor's statements came to light to defend his integrity before the jury, instructing them that he had nothing whatever to do with the selection of the defendants. (7097-98, 7101) In this regard, it cannot be overemphasized that it was the Prosecutor, not the defense, that placed the Court in this compromising situation.

Interjecting the issue of the Court's integrity, which the jury necessarily had to pass on, added an unnecessary and prejudicial issue to an already complicated fact pattern.

IV.

Appellant Perry also urged that conditioning the playing of the tapes upon the availability of transcripts of those tapes unduly restricted his right to cross-examine and confront the witnesses against him. This Panel held that the decision of Judge Judd to so condition the playing of the tapes was a sound exercise of that Court's discretion and refused to state on this record whether there was an abuse of his discretion. slip op. at p. 2605. This decision is contrary to the weight of authority in not only this Circuit but other Circuits as well. The authority is overwhelming that original tape recordings are admissible at trial. United States v. Bryant, 480 F.2d 785 (2d Cir., 1973); United States v. Greenberg, 445 F.2d 1158 (2d Cir., 1964); United States v. Leighton, 386 F.2d 822 (2d Cir., 1967); United States v. Kaufer, 406 F.2d 550 (2d Cir., 1969); United States v. Koska, 443 F.2d 1167 (2d Cir., 1971). While these cases refer to tape recordings clandestinely made by either a Government agent or its witness in hopes of obtaining incriminating evidence against a defendant, the result cannot be otherwise merely because it is the defense who succeeds in catching the Government in a compromising position. Moreover, it has never been held that the production of the transcripts is a condition precedent to the playing of the tapes. In fact, in the majority of the cases, it was the introduction of the transcript that was contested as prejudicial and not just

the playing of the tapes. United States v. Bryant, supra; United States v. Koska, supra.

If this Panel's decision is to be followed, a double standard would definitely be the result. It appears that the Government has great leeway in using its taped sessions while the defense will be unduly restricted. Such a practice offends even the most basic concept of our Due Process Clause.

V.

Appellant Perry also contends that the cumulative effect of all the errors committed during the course of the trial deprived him of his Due Process right to a fair trial. Such errors consisted of:

1. The specific references to Appellant Perry as being a member of a "fierce mob," the son of the made man, and a bookmaker.

2. The testimony of the mathematician which had no place in a criminal trial. This Court acknowledged that there might have been an "overkill" in the mathematical, statistical, and graphic evidence introduced in the case but still refused to deem it reversible error. The Panel was of the opinion that such evidence bore on the defense contention that Gerry was a great handicapper. However, once the mathematician admitted that he, too, could "beat the races," his testimony should have been stricken. (6352)

3. The charge to the jury was replete with prejudicial statements and was without a doubt biased in favor of the Government. In reference to this charge, the Panel asserted:

The judge would have been better advised to omit certain statements, particularly a comment on his interest in why Pullman insisted on receiving a grant of immunity rather than pleading guilty and "taking his chances on the sentence I might impose." While this and other statements in the charge were unnecessary and unfortunate, we do not believe that they resulted in any prejudice to the appellants. slip op. at p. 2607

4. Appellant Perry claimed that evidence of the prior similar acts was inherently prejudicial. This Panel upheld the propriety of such evidence on the ground that the acts established that one or two drivers could fix a race. However, even the closest examination of the testimony of Zito and Haberstraw on the subject fail to demonstrate how such a feat could be accomplished. Their testimony pertaining to how races could be fixed is both garbled and confused, lacking total probative value.

5. And of course, the sum total of the Government misconduct in this case and the issues arising as a result of this misconduct affected Appellant Perry's right to a fair trial.

Although this Panel characterized many of the incidents occurring during the trial as "unfortunate" or "unnecessary," this Panel did not consider the total effect of all the above-cited claims of error on Appellant Perry's Due Process right to a fair trial. Such a review would clearly compel the reversal of his conviction.

CONCLUSION

For the above stated reasons, the Petition should be granted and the opinion of the Court vacated or modified.

Respectfully submitted,

Jacob P. Lefkowitz
Attorney for Appellant
150 Broadway
New York, New York 10038

JULIA P. HEIT
Of Counsel

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 548, 692—September Term, 1974.

(Argued January 13, 1975 Decided March 28, 1975.)

Docket Nos. 74-2100, 74-2106

UNITED STATES OF AMERICA,

Appellee,

—v—

FORREST GERRY, Jr. and RICHARD PERRY,

Appellants.

Before:

LUMBARD, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from judgments of conviction after jury trial in the Eastern District of New York, Orrin G. Judd, *Judge*, finding appellants guilty of influencing the outcome of harness races by bribery and of conspiracy to do so in violation of 18 U.S.C. § 224.

Affirmed.

TERRENCE M. BROWN, Attorney, Department of Justice, Washington, D.C. (David G. Trager, United States Attorney, Eastern District of New York, and Peter M. Shannon,

2583

A1

Jr., Attorney, Department of Justice, Washington, D.C., on the brief), *for Appellee.*

FREDERICK P. HAFETZ, Esq., New York, N.Y.
(Goldman & Hafetz, New York, N.Y., on the brief), *for Appellant Forrest Gerry, Jr.*

JULIA P. HEIT, Esq., New York, N.Y. (Jacob P. Lefkowitz, New York, N.Y., on the brief), *for Appellant Richard Perry.*

LUMBARD, *Circuit Judge:*

Following an eleven-week jury trial in the Eastern District of New York, the appellants Forrest Gerry and Richard Perry were on May 31, 1974 convicted of influencing the outcome of harness races by bribery (count 1) and of conspiring to do so (count 2) in violation of 18 U.S.C. § 224. The indictment which set forth the charges against Gerry and Perry named twenty-eight individuals as defendants. Of these, two pled guilty;¹ five were severed;² the trial judge directed verdicts of acquittal as to five; and the jury acquitted fourteen. Only the two appellants were convicted.

On July 19, 1974 the appellant Gerry was sentenced to concurrent terms of four years imprisonment on each of the two counts and was fined ten thousand dollars on each count. The appellant Perry was sentenced, also on July 19, 1974, to concurrent terms of two and one-half years

¹ Seymour Rothstein see n.15 & p. 2596 *infra*, pled guilty prior to trial. Michael Sherman, see n.5 & p. 2588 *infra*, was a fugitive at the start of the trial and pled guilty after his arrest.

² One of those severed, Joseph Pullman, see pp. 260-2603 *infra*, received a grant of immunity and testified at trial. After the trial was concluded the indictments were dismissed on motion of the government as to the four other defendants who had been severed.

imprisonment on each of the two counts and was fined ten thousand dollars.

Perry was sentenced under 18 U.S.C. § 4208(a)(2) with eligibility for parole after six months imprisonment.

As is not surprising after a multi-defendant eleven-week trial, the appellants raise many claims of error. These alleged errors relate generally to (1) the sufficiency of the evidence; (2) the correctness of various evidentiary rulings made by the trial judge; (3) the use, consequences, and implications of tapes surreptitiously recorded at the prosecutor's office; and (4) the propriety of both the prosecutor's summation and the court's charge. We find that none of these claims are substantial and we therefore affirm.

I. *The Evidence*

The record, viewed in the light most favorable to the government, *United States v. McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), reveals a scheme master-minded by Gerry and implemented by Perry and others which operated from January through April 1973 and which had as its purpose the illegal fixing of a specific type of harness race, the "superfecta." A "superfecta" race is a harness race in which there are generally eight horses competing. Its uniqueness does not lie in the way the race is run but in the way that the wagering is conducted on the race. There are basically three types of "superfecta" bets: a three dollar bet; an eighteen dollar bet; and, a seventy-two dollar bet. To win a three dollar bet the bettor must select the first four horses in the exact order in which they cross the finish line. In the eighteen dollar bet, also known as a "key box," the bettor selects four horses and designates one of the four to finish in first place. The bettor does not, however, have to select the exact finishing order of the other three horses he selects. In the seventy-two dollar

bet, also known as a "box bet," the bettor must choose merely the first four horses; he does not have to select any order in which they finish.

A vice president of the Off Track Betting Corporation, Michael Shagan, testified as to the statistical probabilities of winning a "superfecta" bet. He explained that in an eight horse race there were 1,680 possible combinations of four horses finishing in an exact order in the first four positions. Therefore, the odds against winning on a three dollar bet were 1,680 to 1. If, however, a bettor could eliminate one or two horses from his consideration the odds would change dramatically. As Shagan testified, if a bettor were only to consider six horses rather than eight then on a three dollar bet the odds would be reduced from 1,680 to 1 to 360 to 1.

Viewed in another perspective, it would cost \$5,040 to place three dollar bets on all possible combinations of four horses in an eight horse race. It would cost half of that amount or \$2,520 to place three dollar bets on all possible combinations of four horses in a seven horse race and just \$1,080 if only six horses are considered. Since in 1973 the average return for a winning "superfecta" ticket was \$3,000, a bettor who could definitely eliminate one or two horses from consideration could afford to bet on all the possible combinations remaining and have a near mathematical certainty of winning more money than he spent on purchasing the wagering tickets.

The attempt to eliminate one or more horses from consideration in the "superfecta" betting formed the basis of the conspiracy alleged at the trial. Bribery of harness race drivers was the means by which the conspiracy was implemented.

The evidence showed that the appellant Gerry offered bribes to certain race drivers to finish in specified positions, usually in the last four places or "out of the money"

in a particular "superfecta" race. Allen Cantor, a harness race driver who was named as a co-conspirator and who testified at trial under a grant of immunity, stated that on January 24, 1973 he had a discussion with the appellant Gerry near Roosevelt Raceway about the "superfecta" race to be run that evening in which he, Cantor, was scheduled to drive one of the horses. Cantor testified that Gerry asked him to "finish out of the super" and told him that if he did so Gerry would give him either a thousand dollars or a ticket on the winning combination. Cantor admitted having told Gerry he would prefer the thousand dollars and he also admitted that he had received \$800 from Gerry on the next day, his horse having finished seventh in the "superfecta" race. Another harness race driver, Randolph Perry,³ also testified to a conversation with Gerry which, though more equivocal than the Gerry-Cantor conversation related above, the jury could reasonably have inferred was an attempt by Gerry to bribe Randolph Perry to finish out of the first four positions.

Having offered bribes to one or more drivers to insure that their horses would be in specified positions, Gerry would then bet large sums of money covering all possible combinations in which those horses were in the appropriate positions. Though Gerry bought a large number of "superfecta" tickets himself, most of the actual placing of the bets was done by Gerry relaying the preferred combinations to other gamblers. One of the other gamblers to whom Gerry relayed the combinations was the appellant Perry.

Perry's relationship with Gerry and his role in the conspiracy was explained by Bruce Cussell, a former employee of Perry's who testified in behalf of the govern-

³ The record fails to show any familial relationship between this witness and the appellant Richard Perry.

ment.⁴ Cussell, who was twenty-eight years old at the time of trial, had attended elementary school with Perry and had known Perry "off and on" his whole life. Beginning in February or March 1973 Perry paid Cussell two hundred dollars per week to perform certain services for him. As a daily routine Cussell would bring the New York Times, breakfast and a trotting sheet for the evening's races to Perry's house in Brooklyn where the two of them would wait a call from Gerry. At approximately 11:00 a.m. or noon Gerry would call and during the call Perry, using the trotting sheet Cussell had brought, would make a circle next to the dead horses, *i.e.*, the ones that were not to finish in the first four positions, and make an "x" next to those that should be "keyed." Cussell testified that Perry had told him that he had fixed races with Gerry and that Gerry would contact the drivers and give them either one thousand dollars or a winning ticket.

Following his daily call from Gerry, Perry would, according to Cussell's testimony, call Michael Sherman⁵ and Peter Vario⁶ and relay to them the combinations he had received from Gerry. Perry would then give Cussell between \$9,000 and \$15,000 which was to be used to purchase tickets on the designated combinations. After purchasing the tickets at an Off Track Betting Office,⁷ Cussell would hand the tickets over to Perry and then accompany him to the race track.

When the "superfecta" race had been run Perry would generally pass the winning tickets on to others to cash

4 Cussell's competency as a witness is discussed at pp. 2589-2590 *infra*.

5 See n.1 *supra* & p. 2584 *infra*.

6 A co-defendant who was acquitted by the jury.

7 During the time period covered in this indictment the Off Track Betting Corporation did conduct "superfecta" betting. It has, however, discontinued this type of betting.

since persons cashing winning "superfecta" tickets over \$900 are required to complete and verify an Internal Revenue Service form.⁸ Occasionally, Gerry and Perry would cash tickets themselves. During the three and one-half months of the conspiracy, January through April of 1973, Gerry was responsible for having placed over one million dollars in bets which resulted in gross winnings of approximately two and one-quarter million dollars.

The defense attempted to establish that a good handicapper could do very well in "superfecta" betting and they called George Levy, President of Roosevelt Raceway, who testified that prior to any indication of wrongdoing he had suggested that the "superfecta" be terminated because he was afraid of what a good handicapper with ample funds could do. The defense also called racing experts who had either been present at or had viewed films of the races that had allegedly been "fixed." These experts testified that they had observed no wrongdoing on the part of the defendant drivers. None of the defendants testified.

II. *Sufficiency of the Evidence*

The recital of the evidence disposes of Gerry's first claim of error, that the evidence was insufficient. Moreover, Gerry's brief concedes that "viewed in the light most favorable to the government, the evidence against Gerry is sufficient."⁹

Perry claims that the government failed to produce sufficient evidence to establish that he knowingly participated in any bribery scheme and that, excepting the testimony of

8 The form required to be filed is Internal Revenue Service form 1099. Those cashing winning tickets on a commission basis are often referred to as "ten percenters."

9 Brief for Appellant Gerry at 21.

Bruce Cussell, all that was shown was that he had participated in a handicapping scheme with Gerry. Perry argues that we should not consider the testimony of Bruce Cussell as he was an incompetent witness. We disagree.

III. *Competency of Witness Cussell*

Perry argues that the failure to hold a hearing to determine whether Cussell was a competent witness requires reversal. He does not contend that the fact that Cussell had been a patient at a mental hospital rendered him incompetent to testify as a matter of law. *United States v. McFarland*, 371 F.2d 701, 705 (2d Cir. 1966) *cert. denied*, 387 U.S. 906 (1967); 2 J. Wigmore, *Evidence* § 497 (3d ed. 1940). He does, however, argue that the trial court erred in not holding a hearing to explore the competency issue.

On April 8, 1974, during the trial but prior to Cussell's being called as a witness, a defense attorney asked the Court to conduct a hearing on Cussell's competency to testify. The prosecutor replied that he had received a letter that morning indicating that Cussell was not suffering from any impairment of memory or ability.¹⁰ Later the same day Perry's attorney asked Judge Judd when he should arrange to have a defense psychiatrist present in court for the voir dire examination on Cussell's competency. Judge Judd instructed him to have the psychiatrist present at 2:00 p.m. the following day, April 9, 1974. On the morning of the ninth the government supplied the defense attorneys with a copy of the letter, referred to the preceding day, from Dr. Parlade dated April 5, 1974 which indicated that Cussell's mental condition would not in any way effect his testimony. The defense psychiatrist was

¹⁰ At this point in the trial it was not clear from whom the government received the letter. It later became evident that the prosecutor was referring to a letter from Dr. Parlade dated April 5, 1974.

apparently never produced that afternoon or anytime thereafter and Cussell took the stand on April 15, 1974 without any objection.

Cussell's mental competency and his psychiatric history were fully explored both on direct and cross-examination. He was under psychiatric care and on medication at the time of trial and had a history of mental illness. During cross-examination another request was made to disqualify Cussell on the grounds of mental incompetency. Although the trial judge had not explicitly ruled that Cussell was competent to testify, he had permitted Cussell to take the stand after reviewing the correspondence from Dr. Parlade.¹¹ Further, when the competency argument was raised on cross-examination, Judge Judd stated that Cussell's answers had been comprehensible and intelligent and that his testimony had been corroborated on many points by the testimony of government agents. From all this we think it readily apparent that, notwithstanding the lack of an express finding, Judge Judd made it clear to all parties that he found Cussell competent to testify.

The competency of a witness to testify before a jury is a threshold question of law which lies exclusively in the trial court's discretion. *United States v. Benn*, 476 F.2d 1127, 1130 (D.C. Cir. 1972). When competency is questioned there is no legal requirement that the trial judge conduct a formal hearing. There must be such an inquiry as will satisfy the Court that the witness is competent to testify but the form of that inquiry rests in the discretion of the trial court. *Henderson v. United States*, 218 F.2d 14, 17-18 (6th Cir.), *cert. denied*, 349 U.S. 920 (1955). The trial judge's determination on the question of competency

¹¹ In addition to the April 5, 1974 letter, Dr. Parlade sent another letter dated April 8, 1974 in which he reaffirmed his opinion that Cussell had no memory impairment and that his mental condition would not affect his testimony.

will not be disturbed unless it was "clearly erroneous." *United States v. Crosby*, 462 F.2d 1201, 1202 (D.C. Cir. 1972); *United States v. Hardin*, 443 F.2d 735, 737 (D.C. Cir. 1970).

Having decided to permit Cussell to testify, Judge Judd repeatedly stated both throughout the trial and in his charge that Cussell's credibility was a question for the jury. Once a threshold finding of competency to testify is made by the court, it becomes the function of the jury to determine credibility. *United States v. Benn, supra*, 476 F.2d at 1130. Judge Judd's finding of Cussell's competency as a witness was not clearly erroneous and he properly instructed the jury regarding the determination on Cussell's credibility.

IV. *Alleged Prejudicial References*

Both appellants argue that the trial court erred in not excluding testimony that alluded to a "fierce mob," a "made man," and a "bookmaker." They contend that the introduction of this testimony was a deliberate attempt by the government to associate them, in the minds of the jurors, with the Mafia and thereby deprive them of a fair trial. We find that when these isolated references are viewed in the context of the testimony during which they were elicited and when weighed in the perspective of an eleven-week trial which produced over ten thousand pages of transcript, the appellants were neither unduly prejudiced nor denied a fair trial.

The reference to a "fierce mob" was made by David Kraft who, on direct examination, testified that from February through April of 1973 he received phone calls from Gerry telling him which horses to bet on in the "superfecta." Kraft relied on Gerry's information because Gerry told him that he could "reach" the drivers. On cross-examination Kraft admitted that he had lost money by

betting on Gerry's information and that he felt that he was a "victim of something." Asked if he thought that he was the victim of a "tout" scheme,¹² Kraft replied that he did not believe so. In an attempt to clarify this testimony and to rehabilitate its witness the government, on re-direct examination, sought to bring out the reasons underlying Kraft's belief that it was not a "tout" scheme: first, that too many horses were finishing exactly where they were supposed to; and, second, that according to Joseph Pullman, Gerry was giving the combinations to a guy by the name of Richie in Brooklyn who was connected with the mob and "you just don't tout those kind of people." The government asked for a ruling on the admissibility of this testimony and Judge Judd at first refused to allow testimony about the second reason which related to mob involvement.

When, however, on re-cross examination, Perry's attorney attempted to show that Kraft's testimony about Perry was of recent fabrication, Judge Judd reversed himself and decided that with a limiting instruction the second reason for Kraft's disbelieving that it was a "tout" scheme (*i.e.*, that the mob was involved and no one touts them) was admissible. Both immediately before and after the admission of this testimony the jury was instructed to consider it only to the extent that it related to the state of mind of the witness Kraft and that it was "not to be taken as evidence that anyone belongs to any mob."

The reference to a "made man" occurred during the testimony of Joseph Pullman, an indicted co-conspirator

¹² The charge to the jury described the questioned "tout" scheme as follows:

"The implication in the cross examination of Mr. Kraft was that Mr. Gerry was a con artist, who induced his betting clients to pay him money that he represented to be bribes but that he never actually bribed anybody and just put the money in his own pocket."

who testified under a grant of immunity. At trial Pullman denied that his grand jury testimony was truthful.¹³ The government attempted to refresh his recollection with statements he had allegedly made to agents of the FBI. One of these FBI reports referred to a "Richie" as "the son of a made man in Brooklyn." When asked if he had made such a statement to the FBI, Pullman denied that he had ever in his life called anyone a "made man." Pullman testified that he "wouldn't use those words because made man doesn't mean nothing to me. It could be a businessman that was made, financially." Although Pullman denied knowing the meaning of the term "made man" the appellants argue that the term is well-known and connotes membership in the Mafia.

The third and final alleged "mob" reference to which appellants object, *i.e.*, that Perry was a "bookmaker," occurred during the testimony of Marvin Proman. A groom and trainer, Proman had testified in the grand jury about the bribery of harness race drivers. At trial Proman, like Pullman, denied that he had told the truth to the grand jury.¹⁴ The government attempted to impeach Proman's credibility with prior statements he had allegedly made to the FBI. One of those prior statements, which Proman did not recall at trial, was that Perry was a "bookmaker" from Brooklyn. At the time of this line of questioning, the jury was instructed that the questions were allowed solely to impeach Proman's credibility and that the mere

13 The admissibility of Pullman's grand jury testimony is discussed at p. 2600 *infra*.

14 After the government had closed but before the defense began, Proman, who had been missing, was located in California and brought back to New York to testify. Judge Judd permitted the government to reopen its case so that Proman could be called. The admissibility of his grand jury testimony is discussed at pp. 2601-2602 *infra*.

asking of the questions did not justify a finding that the statements made in the questions were true.

Appellants contend that admission of these references to "fierce mob," "made man" and "bookmaker" violated their due process rights by permitting guilt to be established merely by an alleged association with criminal companions, in particular, the Mafia. *United States v. Vaught*, 485 F.2d 320, 323 (4th Cir. 1973); *United States v. Tomaioia*, 249 F.2d 683 (2d Cir. 1957). Exclusion of the reference to a "bookmaker" by the trial court would have impermissibly limited the government's right to refresh the recollection of an obviously recalcitrant and recanting witness. Further, it is difficult to see how the use of the term "bookmaker," which does not have any inherent organized crime connotation, could have been unduly prejudicial or shocking in a trial involving allegations of fixing horse races. Finally, the limiting instruction given by the trial court was clear and correct. Even assuming that the jury, unlike this panel, understood the meaning of "made man" that phrase was an integral part of the government's attempt to refresh the recollection of yet another recalcitrant and recanting witness.

The reference to a fierce mob poses a greater potential for prejudice than either bookmaker or made man. However, in light of the attempt on cross-examination to show that Kraft was being victimized by a "tout" scheme, the elicitation of the two reasons why Kraft did not believe it was a "tout" scheme appears to have been a reasonable and permissible response by the government. Again, the trial court immediately gave the proper limiting instruction that the testimony was to be considered only as it related to Kraft's state of mind, not as evidence that any of the defendants was a member of any mob. Thus each of the three contested references was properly admitted. We fail to see how any one of them standing

alone or all three taken together deprived the appellants of a fair trial. See generally *United States v. Polizzi*, 500 F.2d 856, 888 n.54 (9th Cir. 1974); *United States v. De Masi*, 445 F.2d 251 (2d Cir.), cert. denied, 404 U.S. 882 (1971); *Carbo v. United States*, 314 F.2d 718, 739-40 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964).

V. *Testimony Regarding State of Fear*

Another evidentiary ruling challenged by the appellants involved the admission of testimony elicited to impeach a recanting witness' denial of fear. Having pled guilty to one count of the indictment in this case, Seymour Rothstein testified as a government witness on April 23, 1974 and gave testimony damaging to Gerry and other defendants. No defense attorney cross-examined Rothstein. On May 10, 1974 he received a suspended sentence on his guilty plea.¹⁵ Five days later, on May 15, 1974, Rothstein was called as a defense witness. He then stated that much of his earlier trial testimony was false and that he had lied for the government when threatened that otherwise the prosecutor would use his influence to insure that he receive a five-year jail sentence. Rothstein claimed that he had told both the prosecutors and the FBI that he did not know Perry but that he had been forced to testify that he did know him.

The government's response to these allegations was an attempt to show that the recantation was motivated by Rothstein's fear for his own life. On cross-examination by the government Rothstein was asked if he had ever expressed fear for his own "personal safety to anybody during the course of this proceeding." He insisted that he

¹⁵ Judge Judd sentenced Rothstein to a term of imprisonment of one year and one day but suspended execution of the sentence and placed Rothstein on probation for three years.

had not. To impeach this denial, Frederick Eder, Rothstein's probation officer, was permitted to testify that in January 1974, two months prior to trial, Rothstein had expressed to him fear for his personal safety. Further, the government was permitted to introduce a memorandum, which had been shown to the witness prior to trial, from Michael Pollack, the chief prosecutor in this case, to the Department of Justice. The memorandum, which was dated February 3, 1974, requested the termination of subsistence payments to Rothstein because he had left the area to which he had been relocated "and returned home, and [could] no longer be considered secure." Both the Eder testimony and the subsistence memorandum were admitted because they impeached Rothstein's denial of fear for his safety.¹⁶

Appellants argue that the admission of this "fear" testimony resolved the trial into a swearing contest in violation of *United States v. Cunningham*, 446 F.2d 194, 197 (2d Cir.), cert. denied, 404 U.S. 950 (1971). In *Cunningham* a government witness did not give the testimony injurious to the government's case but he failed to remember certain events and conversations about which the government had expected him to testify. We held that under those circumstances it was improper to call a government agent to testify to conversations he had with the non-remembering witness since "[t]he maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised," and "where the witness gives no testimony injurious to the party calling him, but only fails to render

16 Appellants contend that evidence of fear was irrelevant since any fear that may have existed could have been related to a prior loan-sharking case, a case which this jury was aware of. The existence of another possible cause of fear did not render the fear testimony inadmissible but merely affected its weight.

the assistance which was offered . . . professing to be without knowledge on the subject . . . is no reason or basis for impeachment. . . ." *United States v. United States*, 24 F.2d 910, 913 (9th Cir.), modified on other grounds on rehearing, 26 F.2d 463, cert. denied sub nom. *Lee v. United States*, 278 U.S. 605 (1928), cited with approval in both *United States v. Cunningham*, 446 F.2d 194, 197 (2d Cir.), cert. denied, 404 U.S. 950 (1971) and *Taylor v. Baltimore & Ohio R.R.*, 344 F.2d 281, 284 (2d Cir.), cert. denied, 382 U.S. 831 (1965).

The witness Rothstein went far beyond asserting a failure of memory and directly accused the government of forcing him to commit perjury. Under these circumstances, "the Government could not be expected to remain silent in the face of a claim, vigorously developed by defense counsel . . . that it had procured false testimony by threats . . ." *United States v. Rivera*, (No. 74-2115) (2d Cir. March 13, 1975) (slip op. 2263, at 2277). Further, "[i]t was competent for the Government not simply to deny that threats on its part had led to [Rothstein's direct] testimony but also to assert that it was his recantation rather than his [direct] testimony which was due to fear resulting from threats by unnamed third parties." *Id.* at 2278.

In addition to their *Cunningham* argument, the appellants contend that the testimony of Eder and the subsistence memorandum were improperly admitted because there was no evidence connecting any defendant to any threat to Rothstein's safety. No such connection need be shown.¹⁷

17 The defendants may have been entitled to a limiting instruction that there was nothing in any of the evidence adduced to show that any of the defendants were responsible for any threats. No request for such an instruction was made either during Eder's testimony or at the time the subsistence memorandum was introduced. *United States v. Rivera*, *supra*, at 2278-79.

Rivera, *supra*, at 2278; *United States v. Franzese*, 392 F.2d 954, 961 (2d Cir. 1968), *vac. & rem'd on other grounds*, 394 U.S. 310 (1969).

VI. Prior Similar Acts

Yet another evidentiary ruling which the appellants claim requires reversal was the admission of prior similar acts, specifically testimony that in 1965 two of the driver co-defendants had fixed races. The rule in this Circuit as to prior criminal activity is in the inclusionary form and holds that evidence of other crimes is admissible except when offered solely to prove criminal character. *United States v. Keilly*, 445 F.2d 1285, 1288 (2d Cir.), *cert. denied*, 406 U.S. 962 (1971); *United States v. Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). In light of the defense contention that one or two drivers could not fix a race, the testimony that in the past one or two drivers had successfully fixed races was certainly probative. Therefore, when the testimony of these prior similar acts was offered not solely to show criminal character but to show that a race could be fixed by one or two drivers it was admissible with a proper limiting instruction. Such an instruction was given in this case.

Gerry relies on *United States v. Deaton, supra*, to argue that it was error to admit testimony that in 1966 his license as a harness race driver was suspended for one week by the New York State Harness Racing Commission for lack of financial responsibility. As discussed above, *Deaton* would mandate exclusion of this testimony only if it were offered solely to show bad or criminal character. The trial court admitted the license suspension testimony because it found that Gerry's financial responsibility had been put in issue by the defense contention that Gerry was "one of the greatest handicappers in the

world." While financial responsibility and handicapping skill are not necessarily interrelated, it can not be said that the suspension evidence was admitted solely to denigrate Gerry's character.

VII *Prior Grand Jury Testimony of Witnesses*

A further evidentiary ruling to which Gerry takes exception permitted the introduction of the prior grand jury testimony of Marvin Proman and Joseph Pullman, both of whom testified at trial and both of whom recanted. Gerry concedes that the prior grand jury testimony of Proman and Pullman would be admissible under our holding in *United States v. DeSisto*, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964), which indeed we adopted with the situation of recantation of grand jury testimony in particular view. He contends, however, that the prior grand jury testimony would not be admissible under Rule 801(d)(1) of the new Federal Rules of Evidence. This argument rests on a serious misreading of the new Rules which were signed by the President on January 2, 1975 and which became effective on the one hundred and eightieth day after enactment. Rule 801(d)(1) not only adopts but somewhat expands the *DeSisto* rule. The prior grand jury testimony was clearly admissible. See *United States v. Rivera, supra*, at 2274-75.

Gerry also objects to the admission of Proman's grand jury testimony on the ground that it contained impermissible hearsay statements made by Michael Sherman to Proman. In the grand jury Proman had testified that Sherman gave him money to bribe harness race drivers to finish "out of the money" and that Sherman had told him that the money came from Gerry. It is Gerry's position that for the Sherman statements to be admissible under the law in this Circuit it must first be shown by a

fair preponderance of the non-hearsay evidence that Sherman participated in the conspiracy. *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). Assuming solely for purposes of this argument that Gerry's contention is not an unwarranted extension of *Ganey*, we find that there was sufficient non-hearsay evidence to establish by a fair preponderance Sherman's participation in the conspiracy. There was non-hearsay testimony of Sherman's acts which is found in Proman's grand jury testimony; Cussell's testimony as to Perry's daily calls to Sherman; Lipkin's testimony that he saw Perry in Sherman's motel room; and the record of phone calls from Sherman's motel room to phones listed to Proman and Perry. There was no error in admitting Proman's grand jury testimony as to Sherman's declarations.

VIII. *Other Evidentiary Rulings*

Perry alleges that he was impermissibly prejudiced by a ruling of the trial court which allowed FBI Agent Sean Hilly to testify to a post-conspiracy admission Hilly overheard Gerry make to Kraft. Perry claims that in a joint trial the introduction of Gerry's admission violated his sixth amendment right to confrontation. *Bruton v. United States*, 391 U.S. 123 (1968). We find this contention to be without merit since the admission contained no reference to any other defendant and since the jury was properly instructed that the testimony was received only against Gerry. See *United States v. Trudo*, 449 F.2d 649, 651-53 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

Gerry and Perry assign as error the introduction of the testimony of the mathematician, Dr. Yaspan, and the numerous charts and graphs used to establish betting patterns. They claim that this evidence was not probative on

the question of bribery as it permitted the jury to convict them on the basis of probabilities, possibilities and mathematical speculation. See Tribe, *Trial by Mathematics*, 84 Har. L. Rev. 1329 (1971). While there may have been an overkill in the mathematical, statistical, and graphic evidence introduced in this case, certainly sufficient evidence of actual bribery was adduced to refute the contention that the jury verdict was based on mathematical probabilities and not on actual evidence of bribery. In any event, this testimony was introduced for purposes of meeting defendants' argument that Gerry's apparent success was attributable to his handicapping skills and the judge gave appropriate cautionary instructions to remind the jury that Gerry's skills as a handicapper reflected his special knowledge of the field and not simply a mechanical application of a rule excluding horses bearing the longest odds.

IX. Prosecutor's Conversations with Witness; The Pullman Tapes

In addition to their claims of error relating to the sufficiency of the evidence and the various evidentiary rulings discussed above, appellants claim that the trial judge's handling of the problems arising out of a surreptitious taping of conversations held at the prosecutor's office was so prejudicial as to require reversal. Joseph Pullman, an indicted co-conspirator whose case had been severed prior to trial, had given testimony in the grand jury that was most damaging to Gerry and other defendants. After his grand jury testimony but prior to his being called at trial, Pullman, on April 16, 1974, met with Gerry's attorney and agreed surreptitiously to tape his interview sessions at the prosecutor's office. During the trial, on April 18, 19 and 21, 1974, Pullman went to the office of the Brooklyn Strike Force with a hidden taping device. While Pullman was

allegedly present at the Strike Force office to prepare for his forthcoming testimony, the tapes reveal that his real purpose in being there was deliberately to draw the prosecutors and government agents into making damaging statements. The fact that Pullman had taped his interview sessions was not immediately revealed, apparently because Pullman hoped to receive a grant of immunity before his taping activities were made known to the government. When Pullman was finally called at trial he denied the truth of his grand jury testimony and claimed that he had been coached in the grand jury by the prosecutor.

The tapes recorded by Pullman contain some unfortunate statements made by both the prosecutors and government agents. When, however, the defense arguments relating to the Pullman tapes are shorn of their rhetoric they resolve into the following contentions: (1) that the government suborned perjury on the part of the witness Kraft and then lied to the court about this alleged subornation; (2) that the court below erred in not ordering Kraft recalled as part of the government case; (3) that the court below erred in requiring the preparation of a transcript of the tapes as a prerequisite to their being played; (4) that statements on the tapes called into question the integrity of the trial judge and he should have declared a mistrial; and, (5) that the court's statements concerning the legality of the taping prejudiced Gerry.

On Friday, April 19, 1974, a day on which Pullman wore a recording device in the prosecutor's office, David Kraft had been cross-examined by the defense attorneys and was expected to resume his testimony on the following Monday. As discussed above in relation to his testimony concerning a "fierce mob," Kraft had been asked whether he believed that he was the victim of a "tout" scheme. That evening at the Strike Force office Kraft discussed his testimony

with government agents. At one point in this discussion FBI Agent Fanning asked: "All right, do you think he was touting Richard Perry? and the Vario's? Do you think he was touting the Vario People?" Based on this question the appellants argue that the government was suborning Kraft to commit perjury. We find that a reading of the transcripts fails to support this charge. Indeed, the question asked by Fanning, when viewed in the context of the entire conversation, appears to have been nothing more than an honest attempt to discover why Kraft didn't believe that there was a "tout" scheme.

We also find no merit in the allegation that the prosecutor, Michael Pollack, deliberately lied to the court as to the date on which he discussed with Kraft possible avenues of rehabilitation. Pollack admitted that he had spoken to Kraft on Friday, April 19, 1974, but that the meeting was chaotic and he did not receive a satisfactory response until Monday, April 22, 1974. Pollack volunteered that "for me, Friday through Monday is one day." While the tapes show a more extended Friday conversation between Pollack and Kraft than Pollack's statements may have led one to expect, Pollack was correct in stating that there were many other people milling about and that the meeting was rather chaotic. Further, there is no reason for Pollack to have misled the court as to whether he spoke to Kraft on Friday or Monday as it was clearly a collateral issue of no significance.

The appellants' second argument arising out of the Pullman tapes is that after the existence of the tapes was made known the court erred in not ordering Kraft recalled as part of the government case so that he could be subjected to further examination based on the tapes. The decision as to when a witness is to be recalled rests in the sound discretion of the trial court. *United States ex. rel.*

Nelson v. Follette, 430 F.2d 1055, 1059 (2d Cir. 1970), cert. denied, 401 U.S. 917 (1971). While it might have been wiser to permit Kraft to be recalled, we find no abuse of that discretion in this matter. The defense attorneys obtained possession of the Pullman tapes while Kraft was still testifying as a government witness. Their decision not immediately to divulge the existence of the tapes and then use them in examining Kraft was a tactical decision. In any event, as the court pointed out, defendants had the opportunity to call Kraft during the presentation of their cases.

The appellants also argue that the trial judge could not condition the playing of the tapes on the preparation of an accurate transcript. This was a decision which rested in the sound discretion of the trial court and, again, we can not say that there was an abuse of that discretion. The judge's insistence on the preparation of a transcript, based in part on his difficulty in understanding the tapes, was both clearly and consistently made known to the defense counsel. The judge himself provided counsel with a rough transcript of all the tapes. Thus he did more than he was required to do. See *United States v. Frazier*, 479 F.2d 983 (2d Cir. 1973).

It is contended by Gerry and Perry that statements contained on the tapes called into question the integrity of the trial judge and he was obligated *sua sponte* to declare a mistrial. Statements made by both the prosecutor and government agents relating to the prosecutor's influence over the trial judge in the matter of sentencing were both deplorable and unprofessional. It was indeed indiscreet for the prosecutor to inform Pullman that the trial judge had supported him in obtaining admission to the bar. However, a full reading of the transcripts shows that Pullman was pressing further and further to elicit damaging state-

ments and that although the prosecutor claimed to have some influence with the judge, he did make it clear that no assurances could be given as to what the judge would ultimately do on sentencing. In any event there was no obligation on the part of the trial judge to declare a mistrial or dismiss the indictment.

The appellants' last contention arising out of the Pullman tapes is that the trial court's statements concerning the legality of the making of the tapes unduly prejudiced Gerry. After the existence of the tapes was made known to the jury, the defense requested an instruction that there was "nothing illegal or wrong or criminal" in Pullman's making the tapes. The judge did not give the requested instruction and stated in the presence of the jury: "I'm not sure about that." He added: "Well, by saying I am not sure, doesn't mean it's wrong. It means I am not sure it is right." The next morning the judge formally instructed the jury that there was no law that prevented the making of the tapes and that the propriety of their having been made had no relationship to the guilt or innocence of any of the defendants. There was no prejudice to the defendant Gerry in these instructions.

X. Prosecutor's Summation

Appellants' final claim of error relates to the propriety of both the prosecutor's summation and the court's charge. In particular, Gerry objects to the prosecutor's discussion of Proman's disappearance prior to trial and the speculation that he was being supported by Gerry during this period. We find that these comments did not transgress the "broad limits" within which "counsel for both sides are entitled to argue the inferences which they wish the jury to draw from the evidence." *United States v. Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968).

XI. *Charge of the Court*

The charge delivered to the jury was a fair and full statement of the law and gave proper guidance to the jury. The judge would have been better advised to omit certain statements, particularly a comment on his interest in why Pullman insisted on receiving a grant of immunity rather than pleading guilty and "tak[ing] his chances on the sentence I might impose." While this and other statements in the charge were unnecessary and unfortunate, we do not believe that they resulted in any prejudice to the appellants. Cf. *United States v. Pinto*, 503 F.2d 718, 724 (2d Cir. 1974).

We have considered the other claims of the appellants and find them to be without merit.

The judgments of conviction are affirmed.

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

APPELLEE,

against

RICHARD PERRY,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

88.

I, Victor Ortega, being duly sworn,
 deposes and says that defendant is not a party to the action, is over 18 years of age and resides at
 1027 Avenue St. John, Bronx, New York
 That on the 10th day of April 1975 ~~XXX~~ at 225 Cadman Plaza, Brooklyn, N.Y.

defendant served the annexed Petition

upon

David G. Trager

the Attorney in this action by delivering a true copy ^{copy} thereto to said individual
 personally. Defendant knew the person so served to be the person mentioned and described in said
 papers as the Attorney(s) herein,

Sworn to before me, this 10th
 day of April 1975 ~~XXX~~

Victor Ortega
 Print name beneath signature

VICTOR ORTEGA

ROBERT J. GRIFFIN
 NOTARY PUBLIC STATE OF NEW YORK
 NO. 01-14444
 QUALIFIED IN NEW YORK COUNTY
 COMMISSION EXPIRES APRIL 1978
 1977